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No. 04-983

IN THE

Supreme Court of the United States

JOE ARPAIO,
Maricopa County Sheriff, in his official capacity,
Petitioner,

v.

JAMIE DEMERY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The Ninth Circuit held that the substantive due process rights of pretrial detainees were violated when images of them from cameras installed in the public areas of a jail were broadcast over the internet. In order to reach this conclusion, the court made several independent legal errors that conflict with decisions by this Court and other courts of appeals and thus warrant certiorari.

First, the court held that the cameras were unconstitutional because Sheriff Arpaio's reason for installing them—to deter the viewing public from committing crime—was an illegitimate government purpose. The court believed that to deter is to punish, and punishing those, like pretrial detainees, who have not been convicted violates due process. In doing so, however, the court conflated two distinct types of deterrence—specific and general. Although seeking to deter the detainee himself from committing future crimes ("specific deterrence") might constitute an illegitimate punitive government purpose, this is not so in seeking to deter the public ("general deterrence"), as the Second Circuit has squarely held. Respondents completely ignore this point in their opposition.

Second, the court held that the cameras were unconstitutional because the other reason Sheriff Arpaio installed them—to increase the transparency and accountability of jailers to the public—was not rationally related to the use of internet broadcasts because the broadcasts went beyond those living in Maricopa County. But, in *Smith v. Doe*, this Court held that the overinclusiveness of a broadcast of information does not make the broadcast unreasonable. To be sure, *Smith* was based on a different constitutional provision (the Ex Post Facto Clause) than the one at issue here, but this Court uses the same doctrinal test for both provisions.

Third, the Ninth Circuit held that the cameras were unconstitutional because the widespread dissemination of public information causes an injury that is protected by the Due Process Clause. But, in *Paul v. Davis*, this Court held precisely to the contrary. Respondents argue that *Paul* is inapposite because it involved procedural due process, but this Court rejected that argument in the very opinion that first established the substantive due process test governing the confinement of pretrial detainees, *Bell v. Wolfish*.

Fourth, the Ninth Circuit's holding stemmed from its decision to apply *Bell* rather than this Court's later decision in *Turner v. Safley* to respondents' claims. This conflicts with the approach of two other courts of appeals. Respondents argue that there are intracircuit splits in these courts of appeals, but the fact that there are intracircuit as well as intercircuit splits is even more reason for this Court to resolve the confusion in the lower courts.

Finally, despite these conflicts, respondents assert a number of reasons why this Court should decline to review this case, none of which has any merit. For example, respondents assert that no other holding facility has "done what petitioner has done here," Opp. at 1, but a quick internet search shows otherwise. In any event, the Ninth Circuit's holdings threaten many similar practices, such as the more widespread one of publishing in the newspaper the names of those arrested for soliciting prostitution. This Court should grant the petition.

ARGUMENT

I. RESPONDENTS DO NOT DISPUTE THAT THE NINTH CIRCUIT'S DETERRENCE HOLDING CONFLICTS WITH A DECISION BY THE SECOND CIRCUIT.

As the Ninth Circuit acknowledged, Sheriff Arpaio installed the internet cameras in the public areas of the jail to "deter crime because the public, having viewed the process of

fingerprinting, pat-down searches, and pretrial detention will decide that being arrested and confined in a pretrial detention center is a fate to be avoided." Pet. App. 14a-15a. As the Ninth Circuit also acknowledged, so long as deterring the viewing public constitutes a "'legitimate governmental purpose'"—i.e., a purpose other than punishing the detainees—then installing the internet cameras for that reason is constitutional. *Id.* at 14a.

Nonetheless, the Ninth Circuit held that Sheriff Arpaio's desire to deter the viewing public was an illegitimate government purpose. The court came to this conclusion because this Court said in dicta in *Bell* that deterrence, "as one of 'the traditional aims of punishment,'" is "'not [a] legitimate nonpunitive governmental objective.'" *Id.* at 15a (quoting *Bell v. Wolfish*, 441 U.S. 520, 538, 539 n.20 (1979)).

The trouble with the Ninth Circuit's reasoning is that when this Court in *Bell* mentioned that to deter is to punish, it was speaking of deterring and punishing *the pretrial detainee*.[1] That is, making pretrial detention more unpleasant for the detainee for the purpose of deterring him from committing future crimes might constitute punishment of the detainee. In criminal law parlance, this is known as "specific deterrence." *See, e.g., United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994) ("'[S]pecific' deterrence means deterring this offender from repeating his offense.").

In this case, however, Sheriff Arpaio installed the cameras in order to deter not the detainees from committing more crimes, but to deter *the viewing public* from committing crimes. In criminal law parlance, this is known as "general deterrence." *See, e.g., id.* ("'General' deterrence means deterrence of others besides the offender . . . ."). In a judicial sleight of hand, the Ninth Circuit conflated general deterrence

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[1] This is clear from the Court's connection of "deterrence" to "retribution," *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979), the latter of which can only refer to the detainee.

with specific deterrence, thereby holding that even the Sheriff's effort to deter *others* qualifies as an effort to punish *detainees* and, accordingly, constitutes an illegitimate government purpose. Pet. App. 16a ("Thus, Sheriff Arpaio cannot point to deterrence, general or specific, as a legitimate government interest . . . .").

In doing so, it is undeniable that the Ninth Circuit has created a split with the Second Circuit, which, when it upheld the practice of parading an accused before the media as he enters a courthouse for processing, very clearly held that seeking to "deter others from attempting similar crimes" is a "legitimate government purpose[]." *Caldarola v. County of Westchester*, 343 F.3d 570, 576 (2d Cir. 2003). Not only is this undeniable, but respondents do not even attempt to deny it. Although this argument was clearly made in the petition, *see, e.g.*, Pet. at 17 ("To be sure, deterrence and retribution *of an accused* for committing a crime of which he has not yet been convicted would not be a legitimate goal. But deterrence of the viewing public is a legitimate governmental objective. *Caldarola*, *supra*." (citations omitted)), respondents do not answer it in any way in their opposition.

II. THE NINTH CIRCUIT'S HOLDING THAT THE INTERNET TOO WIDELY DISSEMINATES INFORMATION TO BE RATIONALLY RELATED TO A LEGITIMATE PURPOSE CONFLICTS WITH *SMITH v. DOE*.

As the Ninth Circuit acknowledged, Sheriff Arpaio also installed the internet cameras to "assur[e] accountability and public scrutiny" of the jail. Pet. App. 17a. And, although the court acknowledged that this was a legitimate government purpose, the court went on to hold that the internet broadcasts were not rationally related to this purpose because the "public exposure" on the internet was too "broad"; broadcasts would go to "internet users from around the world" and not just "the citizenry of Maricopa County." *Id.*

This holding could not more clearly conflict with this Court's holding in *Smith v. Doe*, where this Court rejected the argument (also made by the Ninth Circuit) that the "wide dissemination" over the internet of information about persons convicted of sex crimes and released from prison was "excessive in relation to its . . . purpose" to protect citizens in the State where the offender lived. 538 U.S. 84, 103-05 (2003). This Court held that, despite the unnecessarily broad dissemination, the internet broadcast was "reasonable" in connection to a "nonpunitive objective." *Id.* at 105.

Respondents raise two arguments in an attempt to explain away this conflict. First, they argue that the Ninth Circuit's holding is unique to "*the particular facts in this case*." Opp. at 10. But the only fact that is relevant to the question at hand—whether the internet's broadcast of information more widely than needed to serve a nonpunitive purpose makes the broadcast unreasonably related to that purpose—is whether the information was in fact broadcast over the internet. No one disputes this fact here, nor could respondents possibly dispute that this was also true in *Smith*. *See* 538 U.S. at 91, 105 (noting that "Alaska has chosen to make most of the nonconfidential information available on the Internet" and that "the information was available 'world-wide' and '[b]roadcas[t]' in an indiscriminate manner"). Thus, with regard to the facts relevant to this legal question, this case is indistinguishable from *Smith*.

Second, respondents argue that *Smith* involved a different provision of the Constitution (the Ex Post Facto Clause) than the one at issue here (the Due Process Clause). Opp. at 11. This is a distinction without a difference. This Court has noted that the test it uses under the Ex Post Facto Clause "appl[ies] in various constitutional contexts," *Smith*, 538 U.S.

at 97. One of those contexts is the substantive due process rights of pretrial detainees.[2]

In *Smith*, this Court held that a practice violates the Ex Post Facto Clause if it runs afoul of the factors "noted in *Kennedy v. Mendoza-Martinez*," including whether it has a "rational connection to a nonpunitive purpose . . . or is excessive with respect to this purpose." 538 U.S. at 97. This is the same test this Court applies in the context at issue here. In *Bell*, this Court held that a practice violates the substantive due process rights of pretrial detainees if it runs afoul of "[t]he factors identified in *Mendoza-Martinez*," including "whether the disability is imposed for the purpose of punishment" or whether "'an alternative purpose . . . may rationally be connected [to it], and whether it appears excessive in relation to the alternative purpose.'" 441 U.S at 538. Thus, it is clear that the Ninth Circuit's holding on this point conflicts with this Court's decision in *Smith*.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DUE PROCESS HOLDING IN *PAUL v. DAVIS*.

In *Paul v. Davis*, this Court held that the distribution of a flyer disclosing the public fact that the respondent had been arrested for shoplifting "did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause." *See* 424 U.S. 693, 712 (1976). The Ninth Circuit's conclusion that broadcasting images of respondents' activities in public areas of a jail violates one of the interests protected by the Due Process Clause is in direct conflict with *Paul*.

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[2] Respondents' attempt to distinguish *E.B. v. Vernerio*, 119 F.3d 1077, 1100 (3d Cir. 1997) ("[The] insistence that information regarding criminal proceedings be publicly disseminated is not intended as punishment and has never been regarded as such."), as a double jeopardy case, Opp. at 11, fails for the same reason. *See Smith*, 538 U.S. at 97 (noting that the test used in Ex Post Facto and pretrial detention cases also applies to "double jeopardy" cases.).

Respondents argue that this conflict can be explained away because *Paul* involved procedural due process while the Ninth Circuit's decision was based on substantive due process. Opp. at 14. This, again, is a distinction without a difference. There is only one Due Process Clause in the Constitution, and, although it accords both procedural and substantive protections to "liberty" and "property," it has never been held that the Clause accords substantive protection to some species of "liberty" or "property" for which it does not also accord procedural protection. Thus, in *Bell*, this Court made clear that the inquiry into whether a burden on a pretrial detainee constitutes punishment is simply the same inquiry conducted in *Paul*—*i.e.*, whether the right asserted fell "within the liberty of which no person may be deprived without due process of law." 441 U.S. at 535 n.17. Indeed, respondents' effort to distinguish *Paul* from *Bell* on this point was also made by the dissent in *Bell*, *see id.* at 580 & n.6 (Stevens, J., dissenting)—but, of course, was rejected by the majority, *see id.* at 535 n.17.

IV. THE EXISTENCE OF INTRACIRCUIT AS WELL AS INTERCIRCUIT SPLITS IS EVEN MORE REASON FOR THIS COURT TO RESOLVE WHETHER *TURNER* OR *BELL* APPLIES TO PRETRIAL DETAINEES.

As noted in the petition, courts and commentators have struggled with whether this Court's decision in *Bell* or this Court's later decision in *Turner v. Safley*, 482 U.S. 78 (1987), governs challenges by pretrial detainees to the conditions of their confinement, with three circuits applying *Bell* and two circuits applying *Turner*. Pet. 23-24.

Respondents argue that the two circuits applying *Turner* have now issued opinions applying *Bell*. Opp. at 7-9. But not only do these new opinions not overrule the previous decisions applying *Turner*, but they no where even consider whether *Turner* should have been applied instead of *Bell* (and respondents do not contend otherwise). The fact that there

are now intracircuit splits[3] in addition to intercircuit splits only exacerbates the need for this Court to resolve the confusion in the lower courts on this question. Indeed, the Ninth Circuit itself is confused about this issue, having previously applied *Turner* rather than *Bell* to challenges brought by pretrial detainees in another suit against Sheriff Arpaio. *See Mauro v. Arpaio*, 188 F.3d 1054, 1058-59 (9th Cir. 1999) (en banc).[4]

V. THE PROCEDURAL POSTURE OF THIS CASE DOES NOT DETRACT FROM THE WORTHINESS OF THIS CASE FOR THIS COURT'S REVIEW.

Notwithstanding these conflicts, respondents argue that this Court should deny the petition solely on the ground that the Ninth Circuit's decision was rendered on a motion for a preliminary injunction. Opp. at 15. But this Court routinely reviews preliminary injunctions. *See, e.g., Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783 (2004); *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003); *Department of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002); *Legal Servs. Corp. v. Velazquez*, 531

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[3] *Compare Hause v. Vaught*, 993 F.2d 1079, 1081-82 (4th Cir. 1993) (applying *Turner*), *and Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992) (same) *with Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243, 251 & n.7 (4th Cir. 2005) (applying *Bell*), *and Benjamin v. Fraser*, 343 F.3d 35, 49-50 (2d Cir. 2003) (same).

[4] Respondents contend that it would have made no difference if the Ninth Circuit had applied *Turner* rather than *Bell*. Opp. at 9 n.1. But, in addition to bringing greater uniformity to this Court's inmate jurisprudence by applying *Turner* to inmate claims across the board, applying *Turner* rather than *Bell* provides jailers with more flexibility. Under *Bell*, a condition of confinement is unconstitutional as soon as a judge decides it constitutes punishment, regardless of the importance of the state interest involved. Under *Turner*, by contrast, a court is required to weigh the state's penological interest before declaring a condition of confinement unconstitutional.

U.S. 533 (2001). Thus, the procedural posture of this case is obviously no bar to this Court's review.

Nor have respondents explained why the procedural posture in this case poses any special obstacle to review. Respondents argue that the "district court made no formal factual findings," Opp. at 15, but this simply proves that the petition poses purely legal questions of the sort that ordinarily make up the docket of this Court.

Respondents further argue that "factual issues remain unexamined," including "the nature of Arpaio's contract with the Crime.com website." Opp. at 15-16. But respondents do not explain and it is not apparent why any legal question decided by the Ninth Circuit would be affected by the nature of this contract. Respondents also contend that there is a factual dispute between the parties over whether the cameras were placed only in "public areas" of the jail or whether some of the areas were "non-public." Opp. at 16. But respondents elsewhere concede that the cameras were placed in areas of the jail that were "'open to the public . . . through prearranged tours.'" *Id.* at 3.[5] Moreover, this factual issue is not central to the legal questions presented. For instance, the holding below that general deterrence constitutes an illegitimate government purpose does not turn in any way on where the cameras were placed.

Finally, respondents argue that this Court should not review this case because, they say, "no other jailer in the United States has done what petitioner has done here," Opp. at 1, and, "[t]here is therefore no reason to believe that the question presented will recur," *id.* at 16-17. A quick search of the internet, however, shows otherwise. *See* Anderson County Tennessee Sheriff's Dep't, *Anderson County*

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[5] Nothing can be made of the fact that the public had access to these areas through "prearranged tours" because, for obvious reasons, members of the public are not usually given free reign to walk wherever they wish in places like jails and prisons.

Detention Facility Jail Cam, *at* http://www.tnacso.net/cont/jailcam.php (last visited June 6, 2005). Moreover, the Ninth Circuit's erroneous holding likely has deterred other jails from using such cameras.

In any event, the Ninth Circuit's holdings on what constitutes punishment and what government purposes are legitimate have broad application to many other contexts. For example, some police departments publish the names and pictures of those arrested for soliciting prostitution in the newspaper. One of these departments is in Ingelwood, California, and it apparently adopted this practice in order to deter the reading public from soliciting prostitution (*i.e.*, for general deterrence). *See Inglewood Police Arrest 15 Men During Prostitution Crackdown*, Torrance County Daily Breeze, Apr. 15, 2005, at A4 ("The Inglewood Police Department has implemented a policy to post the names of individuals arrested during anti-prostitution operations to deter this type of activity in the city."). This, and any number of similar practices, would appear now to be unconstitutional under the Ninth Circuit's ruling.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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